IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and THE OSAGE MINERALS COUNCIL, Plaintiffs, vs. OSAGE WIND, LLC; ENEL KANSAS, LLC; and ENEL GREEN POWER NORTH AMERICA, INC., Defendants.	)))))))))))))	Case No. 14-CV-704-GKF-JFJ

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPENING BRIEF IN SUPPORT

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,
and

OSAGE MINERALS COUNCIL,
Intervenor-Plaintiff,
vs. No. 14-cv-704-GKF-JFJ

OSAGE WIND, LLC,
ENEL KANSAS, LLC;
and ENEL GREEN POWER
NORTH AMERICA, INC.,

Defendants.

ZOOM/VIDEOTAPED DEPOSITION OF 30(b)(6) WITNESS
STEPHEN PIKE
TAKEN ON BEHALF OF THE PLAINTIFF
ON SEPTEMBER 30, 2021, BEGINNING AT 10:02 A.M.
ALL PARTIES APPEARING VIA ZOOM

APPEARANCES

On behalf of the PLAINTIFF:

Stuart Ashworth
Cathryn McClanahan
UNITED STATES ATTORNEY'S OFFICE
NORTHERN DISTRICT OF OKLAHOMA
110 West Seventh Street, Suite 300
Tulsa, Oklahoma 74119
(918) 382-2772
stuart.ashworth@sol.doi.gov
cathryn.mcclanahan@sol.doi.gov

(Appearances continued on next page.)

VIDEOTAPED BY: Greg Brown

REPORTED BY: Jane McConnell, CSR RPR RMR CRR

that summary and the specifics on those topics. So, yes, and I did speak with Mirko.

Q Anyone other than Mirko and counsel that you would have spoke to to prepare for this topic?

A I'll think of the individual items. Mirko on the modeling.

I had asked the question of our head of engineering, Douglas Meneghel that I mentioned at the beginning of this day, if he was involved in a calculation for the removal cost. He wasn't.

And I talked to Tom Leboutillier who did perform the summary calculations for the removal of the structures.

Q I'm going to pull up what I've marked -- we're going to mark as Exhibit 209.

(Exhibit 209 marked for identification.)

Q (BY MR. ASHWORTH) This is the document that we received at midnight last night or this morning. Please bear with me. We'll zoom in.

Sir, have you seen this document before on the screen?

A I have.

Q Do you know what this is?

A This is a summary of an estimate of impact if we were to remove the project.

Q When did you first review this?
MR. BALL: Objection to form.
A So this table, the first time I reviewed this table was during my preparation.
Q (BY MR. ASHWORTH) And when was that?
A That was over the past few days as it relates to this table.
Q And over the past few days is the very first time you would have reviewed this document; is that correct?
MR. BALL: Objection to form. You can answer.
A Yes. As it relates to this document, yes.
Q (BY MR. ASHWORTH) Was there any drafts of this document that you would have reviewed?
A There was a summary of these items in one of our responses which is where this had come from, but this draft was developed over the past few days.
Q Okay. Who developed or created this document?
A I created -- I created this document from the information that we had in -- that we had in a response, the earlier response, interrogatory response.

Q Okay. I just want to get some explanations about this. What is this first entry, "free cash flow to equity"? What does that mean?

A So free cash flow to equity is the -- it would be after the cash flow available to the equity partners of the project.

So for every year, starting the year that we take the facility down, that is the sum of the cash flow payments that were assumed in what we call our tax partner model for those years. In this case it was 2021 through the end of the life of the project.

Q This is the payment of money to the equity owners of the project?

A That is the estimated, the estimated payments from the original model that we expect to see in those years as cash flow to the equity partners.

Q And who are the equity partners?

A So the partners for the -- the equity partners for the project are two companies. There's the -- it's an Enel subsidiary, so I think it's Osage Wind Holding is the holding company, and it is made up of an Enel entity.

And then there was a GE entity. I think

it was EFS Osage Wind which had been bought out by a company called Apollo. So today it's Apollo.

Q Okay. I was kind of confused by that response. This is all new to me. So one of them would have been Osage Wind Holding. Did you say Osage Wind Holding is comprised of Apollo or is Apollo --

MR. BALL: Objection; asking for a legal conclusion, but you can answer.

A I'll try and clarify. So Osage Wind Holdings is the holding company of Osage Wind, the project. The Osage Wind Holdings is made up of two entities. One is an Enel entity and the correct term is Enel Kansas, LLC.

And then the other entity is or was at the beginning when they executed the agreement a GE company. It was called EFS Osage Wind, and their interest has since been bought out by a company called Apollo.

Q (BY MR. ASHWORTH) Okay. So when you said partner, equity partners, it's not two, it's one, which is Osage Wind Holding, but then Osage Wind Holding is owned by or was owned by two additional, two other. Is that --

A Osage Wind Holding is made up of two

entities. It's made up of --
Q Is there any other equity partner other than Osage Wind Holding?
A Other than the two entities that I mentioned, no.
Q Okay. And is Osage Wind Holding a partnership or is it an LLC?
MR. BALL: Objection to the extent it calls for a legal conclusion. You can answer.
A To my knowledge, it's an LLC.
Q (BY MR. ASHWORTH) So here in this graph you're representing that if the projects were to be -- the wind farm to be removed, it would result in roughly 133 million as I guess a write-down to Osage Wind Holding, LLC?
MR. BALL: Object to the form.
Q (BY MR. ASHWORTH) Is that what this is explaining?
A What this is explaining is that would be the loss of the free cash flow revenue stream that the equity partners expected to get that they would not get coming from the generation of electricity, salable electricity at the site.
Q So this is a hypothetical number that is not guaranteed; correct?

MR. BALL: Objection to form.

A It is not a guaranteed number. It is an estimate that is based on the average wind generation for the facility. So the generation varies slightly from year to year, but this would be based on the estimated energy, again, verified by an independent engineer, and then the power purchase rate that would be part of our power purchase contract.

So the sum of those would be the revenue stream and then minus the expenses which would be the operation and maintenance of the facility.

Q (BY MR. ASHWORTH) So this number, this approximately 133 million, that is not an expense for something that the defendants would have to pay; correct? It's just a loss, a potential loss of future income?

MR. BALL: Objection to form and objection to the extent it calls for a legal conclusion. You can answer.

Q (BY MR. ASHWORTH) Is that correct?

A It is both. So it is a portion of that. Again, it's based on the free cash flow. There will be a payment or there would be a specific payment to the preferred equity holder if the

project did not continue to exist. So the GE entity has a preferred right, and I think that that is I'll call it roughly 31, 32 million of that 133,000 -- or 133 million.

Q So the GE part of their equity I guess is -- is that like a loan that they're expecting or they're required to pay a certain amount?

MR. BALL: Objection to form.

A I think the best way to look at it is like a loan. There would be a requirement for us to reimburse GE for the $31 million or $32 million amount if we were to stop operating the project. I agree the best way to look at it is like a loan. So it's a preferred -- it's a preferred equity interest, but you can look at it as a loan.

Q (BY MR. ASHWORTH) If the wind project or the wind farm were to cease operations, the defendants would only be required to pay this approximately $31, $32 million to this GE entity; correct?

MR. BALL: Objection to form.

A It's a lot more that would have to be paid if we cease to operate, but as specific to the 133 million?

Q (BY MR. ASHWORTH) Yes.

A That is the makeup of the revenue stream, and if that revenue stream didn't exist, we would have to reimburse GE the 31, 32 million.

Q The defendants would not be paying the remaining approximately $100 million, that's not an expense they'd have to pay relative to this entry?

A It would not be a payment we would have to make. It would be a loss of the revenue that the project was intended to provide based on the investment. So it would be a loss of revenue.

Q It would be a loss to some third party and not to the defendants?

MR. BALL: Objection; mischaracterizes the witness' testimony.

A The loss comes to Enel Kansas which I think is a defendant.

Q (BY MR. ASHWORTH) The last line it says "cash out to tax partner (JPM)." What does that mean? Is JPM JP Morgan?

A Yes. You are correct. JPM is JP Morgan.

Q What does "cash out to tax partner" mean?

A So with a wind farm, there are typically tax partnerships that are entered into that monetize the revenue stream from the production tax credits. So there is a federal production tax credit that a

wind farm is eligible to receive based on the amount of energy it produces.

So we would do a tax partnership with an entity that could use the tax credits, and it's structured in a way where they enter into the agreement for an amount and then receive the benefits back over time through the credits and then through a residual interest in the project.

Q So did JP Morgan pay for or provide money to the defendants in order to become their tax partner?

A Yes. JP Morgan would have as part of the entering in as a tax partner made a payment to become part of the project, yes, to receive the --

Q How much did they make?

MR. BALL: How much did they pay? Is that the question?

MR. ASHWORTH: Sorry. That's correct.

Q (BY MR. ASHWORTH) How much did they pay?

A I am not aware of the amount, amount paid. I'm only aware of the amount we would have to pay if we ceased to operate the project.

Q So if the operation is -- if the wind farm is ceased, the defendants would be required to pay $90 million to JP Morgan to reimburse JP Morgan as

lack of receiving the tax credit; is that your testimony?

A Yes. So my testimony is that we would have to pay JP Morgan for breaking the agreement to provide the tax credits and residual interest in the project. So the model calculates that.

So there would be -- from the beginning of the project we started generating credits, they got some benefit. This is a calculation based on stopping 2001 for the remainder of what they're entitled to for revenues coming from the project, and the tax partner is structured in a way the agreement requires us to pay them for that future benefit if we break the agreement.

Q And what document did you review to determine this amount, this $90 million amount?

A I reviewed the document that we provided which is a part of what we call our tax partner model which shows -- the revenue stream shows the tax distributions, and it shows a calculation of what the balance that JP Morgan would be entitled to which I think in the model shows to be 95 million, but there was an estimate that we could negotiate and close it at probably an amount slightly lower than that. So we used an estimate of 90 million.

Q Did you review the actual agreement between JP Morgan and the defendants relative to this tax partner agreement?

A I did a cursory overview of the LLC agreement that forms the tax partnership but relied on Mirko Lapenta that I mentioned earlier who's an expert in this agreement to summarize what the damage approach would be.

Q And this contractual agreement to that contract, it's called an LLC agreement? What agreement is this called?

A So the agreement, the agreement would be the LLC, Osage Wind, LLC agreement which is how they enter into the project.

Q And that was between Osage -- who were the parties to that agreement?

A So I guess I would have to -- I would have to look. I do have that available. I could look at the parties if necessary, but my recollection is the holding company and then JP Morgan.

Q So if the wind projects were to have to be -- if the wind farm were to be removed, who would actually be responsible for paying this? Would it be Osage Wind Holding or Enel Green Power North America, Enel Kansas, Osage Wind, LLC?

A So it would be the project that would be obligated to pay it which would be Osage Wind, LLC.

Q Okay. The next line, "PPA liquidated damages, AECI," what is this line?

A So we have a power purchase agreement with AECI where we sell our power and obligates us to sell power to them. There is a clause in there that if we terminate, we need to reimburse them for damages. There -- in that agreement there is a clause relative to availability, guaranteed availability damages. So we guarantee that we're going to be generating a certain portion of the time, calculated on a percentage. And if the project was removed, we would not be able to honor and fulfill that part of our agreement.

There is a clause in there that says the liquidated damages are $2 million a year and then -- up until year 12, then after year 12 the damage and damage cap no longer apply. So that would be the last. So that would be three years at $2 million.

The other damage that we could owe on that but we have determined is not going to be owed is if for some reason they had to replace the power that they were expecting to get from us, they would -- they would be entitled to a difference between our

power purchase price and what they would have to buy it back for, and that was determined to be negligible based on today's power prices.

Q Is there any force majeure clause in the agreement that you reviewed which provides for these liquidated damages?

MR. BALL: Objection to form.

A So there is a force majeure clause in the agreement. I don't believe it would relate to these damages.

Q (BY MR. ASHWORTH) Okay. Is there a force majeure clause in the agreement between JP Morgan and Osage Wind Holding relative to the $90 million payment?

A I am not aware of any force majeure clause relative to the 90 million.

Q Is there a force majeure clause in the LLC agreement in general with JP Morgan?

A I would have to look at the agreement. A force majeure clause is a typical part of the agreement. I can look at the agreement if necessary, but a force majeure clause is a typical clause.

Q The next line is "GIA liquidated damages" for approximately 19 million. What's that?

Stephen Pike 9/30/2021 164

A So we have a generator interconnection agreement. That's what GIA stands for which allows us to connect to the local grid. In connecting to the local grid, before the project is built there's an assessment done of what network upgrades there would need to be for the project to be built. So there was an assessment done, and in this case that amount of network upgrades that we had to perform was 22,500,000.

Then the partner, the counterparty to the interconnection agreement, reimburses that and then gets the value of that back over the life of the project. So it gets that spread out in equal payments over the life of the project, over the life of the interconnection agreement.

So this 19 million is made up of two pieces. One is called the undepreciated portion of that 22 1/2 million that the interconnection party AECI had paid for the network upgrades that will no longer get value for them. So that is close to 17 million of that.

Then the balance is just an estimated cost to remove the facilities that we would need to do if we -- if we remove the project, we would need to remove the improvements that were done on the system

as well.

Q So the improvements to the system is separate from -- scratch that.

What agreement/contract provides for these damages? What's the name of the contract?

A So the contract is large generator interconnection agreement. It would be between Osage Wind and AECI.

I believe it had Bates stamped. I looked at it, and I believe it had Bates stamped on it and was submitted.

Q And there's a provision in there that indicates that if you were to cease operations, that you would be required to remove the infrastructure?

A There are two provisions in there. One, that we would have to make the counterparty whole on the undepreciated portion of the improvement, and we would have to disconnect -- disconnect our facilities which would be disconnecting and removal of the specific improvements related to our facility.

Q Let's say that removal, you all did not remove by court order, but in year 2040 the wind farm comes to its natural conclusion, you'll be removing these improvements on your all's side

regardless; is that correct?

MR. BALL: Objection to form; assumes facts not in evidence. You can answer.

A Yeah. What is more typical is at that point in time all the improvements would be fully depreciated, fully written off.

Unless required, we probably would not remove -- or we would disconnect still, we would have an obligation to disconnect. We would remove what was required or necessary.

Again, that's a small portion of the 19.3 million. I think it's 2 or 2.4 of that.

Q (BY MR. ASHWORTH) So are you saying that you would -- you would have to remove those improvements now if the project would be disconnected, but in the future you wouldn't have to remove it because the items were already depreciated?

MR. BALL: Objection to form. You can answer.

A Yeah. It's an assumption that we made since they have the right to ask us to disconnect our facilities, and those were part of our facilities that they would make us remove them.

So of that 19, again, roughly 2 million

is that cost and the assumption that we believe they would exercise their right to have us remove those improvements.

Q (BY MR. ASHWORTH) So thank you. That's speculation, the numbers and costs are speculative; is that correct?

MR. BALL: Objection to form. It mischaracterizes the witness' testimony. You can answer.

A We made an assumption since they have the right, they would exercise the right, and that was the estimated cost for the removal.

Q (BY MR. ASHWORTH) So you're speculating that they would require you to remove?

MR. BALL: Objection to form and argumentative. Sorry. Go ahead.

Q (BY MR. ASHWORTH) Is that yes?

MR. BALL: And asked and answered.

A I am speculating that they would exercise their rights in the contract to have us disconnect and remove those facilities.

Q (BY MR. ASHWORTH) What about this next line, "leases LD and other commitments"?

A So we have six leases on the project with landowners that allow us to have the facilities

there. In that lease there is a termination amount of $10,000 for each of the leases. So it's the six leases times $10,000 per lease.

Q And is there a force majeure clause in those leases?

A I don't recall if there is. I would have to look at the leases.

Q Okay. Is there any insurance that may be applicable to pay for any of these damages if the wind project would have to cease operations?

A I'm not aware of any insurance that would cover the voluntary removal of the wind project.

Q We're not talking about voluntary removal. We're talking about court ordered. Is there any insurance that would pay for any of these alleged expenses if the wind farm were forced to close?

A Again, I'm not aware of any insurance policy that we would have that would pay for the court-ordered removal of this facility.

Q Okay. Next line, "cash out dismantling in 2021." I think that's a -- refers to a different document that I'll refer to later.

The bottom line says, "net financial impact (cash)" of approximately $258 million. Is it your testimony that this is the impact for the total

expense minus the approximate 100 million to the equity partners, this is what the amount the defendants would have to pay if the wind project were ordered to be removed?

MR. BALL: Objection to form, and you can answer if you understand the question.

A Yeah. What the $258 million represents is the financial impact to Osage Wind if the project had to be removed.

Q (BY MR. ASHWORTH) And that impact would be as to which of the defendants? All of the defendants or just some of them?

MR. BALL: Objection to form.

A Could you refresh me on -- you had mentioned three entities as the defendants. Can you just refresh me so I'm sure I answer your question correctly?

Q (BY MR. ASHWORTH) Sure. Enel Kansas, Osage Wind, LLC, and Enel Green Power North America.

A So all of the defendants would be impacted by the removal of the facility, all three of those entities.

Q Well, my question is as to this number, this bottom line number of approximately 258 million minus the 100 million that we discussed going to the